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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1121

CITY OF NEW YORK, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 1122

MARSHALL B. CROSSMAN, ET AL., APPELLANTS

v.

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., ET AL.

On Appeal from the United States District Court for the Central District of California

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the defendant-appellees move that the orders of the district court denying appellants' motions be affirmed (or, alternatively, that the appeals from said orders be dismissed). Plaintiff-appellee, the United States, is filing a separate motion.

sponse to this order, among them appellant Grossman's motion to consolidate the government's action with his private treble damage action "brought representatively on behalf of all of the residents of the United States and California" (Tr. 142) after the filing of the proposed judgment. Appellant City of New York filed an application for leave to intervene for the expressly limited purpose of participating in the consent decree hearing or, in the alternative, for leave to appear at the hearing as *amicus curiae*. R. 166.

At the hearing on October 28, 1969, following presentations by the government and the defendants in support of the decree, appellants and some twenty-odd other interested persons were permitted to appear as *amici* (Tr. 4) and to set forth their reasons why the district court should not enter the proposed decree. As the court noted, "the main goal of the intervenors here is to block the proposed decree in the hopes of compelling the parties to litigate this case to judgment" (J.S. No. 1121 at 11a), since a judgment that the defendants had violated the antitrust laws would be *prima facie* evidence of such violation in private treble damage actions.[9] At the con-

[9] The State of California did not appear, having previously advised the Court by letter that it declined to comment on the proposed decree because of the pendency of its own investigation under California law; the letter noted that the Association and the automobile manufacturers are cooperating in this investigation. R. 410.

[10] The City of New York has indicated that it will join the private treble damage plaintiffs who have to date filed thirteen actions against the Association and the automotive manufac-

clusion of the hearing, the court indicated that it would (1) approve the decree, (2) deny the various petitions for intervention and consolidation, and (3) impound all the evidence before the Grand Jury to preserve it for possible discovery in private treble damage actions. J.S. No. 1121, App. A, pp. 1a-8a.

Besides orally presenting the grounds for its decision and entering a minute order recording its actions (R. 538),[11] the court subsequently filed a memorandum opinion on November 7, 1969. J.S. No. 1121, App. A, pp. 9a-15a. In its opinion the court discussed both appellants' filings in the best possible procedural light, namely, as if they had been straightforward applications to intervene of the kind filed by some of the other interested parties. See *id.* at 10a. The opinion stated, as had the oral remarks, that under settled case law private damage plaintiffs should not be permitted to intervene in a government antitrust action to force the case to trial, where, as here, the government had obtained a consent judg-

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turers based on the allegations in the government's complaint. *See* Transcript of Proceedings Before the Judicial Panel on Multidistrict Litigation in Docket No. 31 (*Multidistrict Private Civil Treble Damage Litigation Involving Motor-Vehicle Air Pollution Control Equipment*) (Jan. 23, 1970) at 8, 52-53. The Panel has scheduled further argument for March 27, 1970, on the question of the appropriate forum for consolidation of pretrial proceedings in these actions.

[11] The decree itself was entered the following day, October 29, 1969 (R. 540), as was the impounding order (note 21, *infra*).

[11] In the minute order (R. 538) and in its oral remarks (J.S. No. 1121, App. A, p. 8a), however, the court had referred expressly to the motion for consolidation and had denied it as such.

ment containing relief that was enforceable, consistent with the government's complaint, without prejudice to third party rights, and in the public interest. The court cited the several precedents prohibiting such intervention. *Id.* at 10a-12a. Noting that the government's case was "based upon a novel and unadjudicated theory" and that success after a long trial was not certain (*id.* at 15a), the court referred to the desirability in the public interest of the "assured" and "immediate" result provided by the decree. *Id.* at 14a. Of the more than twenty persons, groups and governmental bodies which appeared below, only appellants have prosecuted appeals from the action of the district court herein. R. 606, 625.[12]

ARGUMENT

These appeals, besides suffering from procedural defects,[13] present no question meriting further argu-

[12] Seven weeks after the entry of the judgment, appellant City of New York filed an application to intervene after judgment for the stated purpose of taking the instant appeal (R. 610), which motion the court duly denied on December 19, 1969, noting that it presented no new grounds for intervention. R. 618.

[13] In this motion for summary affirmance or dismissal we merely note, without extended discussion, the existence of several apparent procedural defects in the appeals. (1) Since orders respecting consolidation are committed to the sound discretion of the trial court, *Stemler* v. *Burke*, 341 F.2d 393, 396 (6th Cir. 1965), Grossman's appeal must fail because the trial court surely did not abuse its discretion in refusing to consolidate a private damage action with the government injunctive case. (2) The denial of Grossman's motion to consolidate, being interlocutory, is not appealable unless it

ment. In approving a consent decree containing provisions for injunctive relief to which neither appellant objects, the district court clearly did not abuse its discretion merely because the decree did not contain an adjudication of violation of the antitrust laws by the defendants. Following recent decisions by this Court, the district court correctly concluded that the entry of such a decree did not impair or impede appellants' rights to pursue private treble damage actions and that judicial insistence upon such an adjudication or admission of liability would contravene the Congressional policy reflected in Section 5(a) of the Clayton Act. The court also properly rejected appellants' argument that, in the absence of an adjudication or admission of liability which would benefit them and other treble damage claimants, the court lacked authority to approve the decree without first requiring a showing of the evidence tending to prove

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should be held to come within the "collateral order doctrine", *see* 5 Moore, *Federal Practice* ¶ 12.02, in which case the appeal from the denial of the motion would appear to lie in the Court of Appeals, rather than this Court, under the test applied in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39 (1963), *modified* 375 U.S. 994 (1964). (3) All the relief sought by the City of New York in its first limited application for leave to intervene was in fact granted by the court, *i.e.*, it had been permitted to appear in opposition to the decree, and hence no appeal lies from the court's merely formal denial of that application. The court's denial of the second application, filed seven weeks after judgment and seeking for the first time a right of appeal, should be affirmed on the ground that the application was not timely. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 436-37 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580, *reh. denied*, 390 U.S. 975 (1968).

they can work independently and with one another in the research and development necessary to comply with the increasingly stringent regulatory requirements that are now being imposed on motor vehicle emissions.[28] If this case were to be litigated, defendants' scientists and engineers would have to function throughout a multi-year trial in an atmosphere of uncertainty as to the legality of exchanging *any* type of technical information. Entry of the consent decree not only removes these uncertainties and accompanying delays but also permits "appropriately limited" [29]

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[28] In 1965 the Department of Health, Education and Welfare was authorized by the Congress to establish national standards for permissible emissions from new motor vehicles, 42 U.S.C. § 1857f-1 *et seq.*, and the first such standards were made applicable beginning with the 1968 model year. More stringent standards were imposed by the Department for the 1970 and 1971 model years (reducing hydrocarbon and carbon monoxide emissions by more than two-thirds in comparison with pre-1968 vehicles), and substantially more demanding standards have been recently proposed for the 1973 and 1975 model years. *See* Second Report of the Secretary of Health, Education and Welfare, S. Doc. No. 91-11, 91st Cong., 1st Sess., pp. 38-40 (1969); Advance Notice of Proposed Rule Making, 35 Fed. Reg. 2791 (Feb. 10, 1970); President's Message to Congress on the Environment (Feb. 10, 1970), in 116 Cong. Rec. H 743 (daily ed.).

Installation of approved exhaust emission control devices on most new motor vehicles was first made mandatory in California in 1966 model vehicles. Since then California has enacted legislation prescribing specific levels of permissible pollutants from new vehicles through the 1974 model year, Cal. Health & Safety Code, §§ 39100-39112, and the California Air Resources Board has recently recommended that even lower levels be required by legislation for 1975 model vehicles. *See* Report to the California Air Resources Board by the Technical Advisory Committee (Nov. 19, 1969).

[29] Complaint, Prayer, para. 3, *supra*, page 4.

technical exchanges among the manufacturers in order to advance the common fund of basic knowledge and technical "know-how" about the air pollution problem and the control of automotive emissions.

CONCLUSION

The appeals herein fail to raise any issues not fully considered and correctly decided by the district court. Accordingly, the motion to dismiss or affirm should be granted.

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